UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
LIND, CAMPANELLA, and KRAUSS
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E1 TAYLOR J. CORBIN
United States Army, Appellant

ARMY 20130480

Headquarters, 1st Cavalry Division
James L. Varley, Military Judge
Colonel R. Tideman Penland, Jr., Staff Judge Advocate

For Appellant: Colonel Kevin Boyle, JA; Captain J. David Hammond, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Major A.G. Courie III, JA; Captain Benjamin W. Hogan, JA; Major Lionel C. Martin, JA (on brief).

28 May 2015

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

LIND, Senior Judge:

A military judge sitting as a special court-martial convicted appellant, pursuant to his pleas, of one specification of desertion terminated by apprehension; two specifications of disrespect toward a noncommissioned officer; one specification of disobedience of a noncommissioned officer; one specification of assault of a noncommissioned officer; and one specification of communicating a threat in violation of Articles 85, 91, and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 885, 891, 934 (2012). The military judge sentenced appellant to a bad-conduct discharge, confinement for 100 days, and forfeiture of $500.00 pay per month for three months. The convening authority approved the adjudged sentence and credited appellant with 53 days against the sentence to confinement.

This case is before the court for review pursuant to Article 66, UCMJ. Appellant assigns two errors, one of which merits discussion and relief. We agree with appellant's assertion that the facts elicited during his providence inquiry

establish his desertion was terminated voluntarily. We therefore find a substantial basis in law to question his plea to desertion terminated by apprehension and will provide relief in our decretal paragraph.

BACKGROUND

Appellant pleaded guilty to, *inter alia*, one specification of desertion terminated by apprehension. There was no stipulation of fact in this case. During the providence inquiry, the military judge defined "apprehension":

> "Apprehension" means that your return to military control was involuntary, that neither you nor persons acting at your request initiated your return. That you were apprehended by civilian authorities, for a civilian violation, and were thereafter returned to the military by the civilian authorities, does not necessarily indicate that your return was involuntary. Such return may be deemed involuntary, if after you were apprehended, such civilian authorities learned of your military status from someone other than you or persons acting at your request.

The military judge then engaged in the following colloquy with appellant regarding the termination by apprehension element:

> ACC: [A]t the time that I was apprehended I was at a Red Box renting some DVDs. A law enforcement officer pulled up on me, asked me for my ID and I pretty much gave him my ID and I told him, you know, I am pretty sure I have a warrant for my arrest. And he asked me for what? And I said, "I am AWOL from the Army." And he ran my name, ran . . . my driver's license number and I had a warrant for my arrest. And they took me back to Galveston County and then from there I came here.
>
> . . .
>
> MJ: How did it end? You described to me you were at a "Red Box" which is a video dispensing machine, correct?
>
> ACC: I was at a "Red Box" just renting a---it was about ten minutes before the store that the "Red Box" was at closed and my car was the only car in the parking lot at the time. So, I guess this officer drove by, saw my car parked there with no one else there and pulled up---

MJ: A little curious about that?

ACC: Yes, sir.

MJ: So, he stopped and asked you for ID?

ACC: Yes, sir.

MJ: . . . Basically you handed him your ID. Did you know at that point that he was going to run it, basically check it on a computer?

ACC: I had no clue. I had been pulled over before, sir, where they didn't run it but I figured it was---I had that gut feeling that, you know, it was time to just kind of take care of this and get it over with.

…

MJ: . . . If that law enforcement officer hadn't asked for your ID on the 4th of March 2013, might you still be absent?

ACC: Um, that's a possibility, sir. I mean, I knew I needed to get this over with. It wasn't going to be something that I could just forget about and---

MJ: You knew sooner or---you were aware the way this works, where ultimately the Army drops you from the rolls and then issues a warrant for your arrest, right?

ACC: Yes, sir.

MJ: So, you knew in the back of your mind that at some point you would get stopped running a red light or something and then wind up coming back to the military?

ACC: Yes, sir.

…

MJ: What motivated you to tell [the officer that you were absent without leave]?

> ACC: I mean, I was doing the wrong thing at the time and I figured it was time for me to do something right for once.
>
> MJ: Okay. Was it motivated by a desire to return to military service or were you---for some other reason?
>
> …
>
> ACC: It was to keep going to continue service.

At this point, defense counsel asked for a moment to confer with appellant, which the military judge permitted.

> MJ: Getting back to the apprehension, what was your intent when you told him, hey, I am an absent Soldier, was it motivated by a desire to return to the military or were you just trying to reduce the chance that something unpleasant was going to happen when he discovered you had a warrant out for you?
>
> ACC: I was just trying to tell him . . . let him know, pretty much.

The military judge recognized that the facts admitted by appellant so far did not support a finding of guilty to termination by apprehension because he then asked defense counsel: "Now . . . in what sense is this a termination by apprehension?" Defense counsel answered:

> Sir, if the court is inclined to find that it is not, we would ask for that. But I believe the understanding is that he knew that he was to be apprehended. He was aware, I believe, at the time he was at the "Red Box" that he probably would be. He thought he would be. And my understanding is he was just trying to be honest so he cut to the chase, essentially, with the officer.

The military judge gave appellant an additional definition, stating:

> [Y]our return may be deemed involuntary, that is by apprehension, if after being apprehended by civilian authorities you disclose your identity as a result of a desire to avoid trial, prosecution, punishment or other criminal actions at the hands of civilian authorities.

> However, if you disclosed your identity to civilian authorities because your desire to return to military control, your return should not be deemed involuntary or by apprehension.

The judge then continued the colloquy with appellant:

> MJ: Private Corbin, the bottom line here is it comes down to a matter of intent. If you are telling me the only reason you told him you were an absent Soldier is because, essentially, you knew the jig was up and you were going to be apprehended one way or the other and to just---and essentially, you weren't trying to escape trial but basically you were trying to mitigate the situation. That is you were trying to be honest with the cop and say, hey, look, there is a warrant out for me so he doesn't get excited. . . . Now, the question is, were you alerting him out of a desire to return to military service or were you alerting him because essentially, you knew you were caught and you wanted to make things better for yourself. So, why were you doing that? . . .
>
> ACC: I was alerting him because I knew I had been caught and I was trying to make things better.
>
> MJ: You believe based upon that that your return was by apprehension?
>
> ACC: Yes, sir.
>
> MJ: Okay. In other words, you wouldn't have turned yourself in otherwise, right? The reason you were doing it was for your own reasons, not because of a genuine desire to return to military service; is that right?
>
> ACC: Yes, sir.
>
> MJ: ...You weren't taking this an opportunity to turn yourself in, you knew you were caught; is that right?
>
> ACC: Yes, sir.

The military judge accepted appellant's plea to desertion terminated by apprehension as provident.

LAW AND DISCUSSION

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). A guilty plea will only be set aside if we find a substantial basis in law or fact to question the plea. *Id.* (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). The court applies this "substantial basis" test by determining whether the record raises a substantial question about the factual basis of appellant's guilty plea or the law underpinning the plea. *Id.*; *see also* UCMJ art. 45(a); Rule for Courts-Martial 910(e).

"It is an abuse of discretion for a military judge to accept a guilty plea . . . if the ruling is based on an erroneous view of the law." *United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012) (citing *Inabinette*, 66 M.J. at 321-22). We review questions of law arising from a guilty plea, such as whether appellant's desertion was "terminated by apprehension," de novo. *United States v. Schell*, 72 M.J. 339, 342-43 (C.A.A.F. 2013) (citing *Inabinette*, 66 M.J. at 322).

> [A]pprehension contemplates termination of the accused's absence in an involuntary manner; and "termination otherwise" is an absence ended "freely and voluntarily." In other words, the Manual [for Courts-Martial] provision does not differentiate between these two classes of termination by means of particular situations, but rather by way of a broad definition for each category.

United States v. Gaston, 62 M.J. 404, 406 (C.A.A.F. 2006) (quoting *United States v. Fields*, 13 U.S.C.M.A. 193, 196, 32 C.M.R. 193, 196 (1962) (discussing *United States v. Nickaboine*, 3 U.S.C.M.A. 152, 11 C.M.R. 152 (1953). For an accused to be provident to the sentence-enhancing element of termination by apprehension, "the facts on the record must establish his return to military control was involuntary." *Id.* at 405 (citing *Fields*, 13 U.S.C.M.A. at 196, 32 C.M.R. at 196).

An apprehension is involuntary when the return of the accused to military control is "uninitiated by him or by another acting at his request." *Fields*, 13 U.S.C.M.A. at 197, 32 C.M.R. at 197 (citing *United States v. Simone*, 6 U.S.C.M.A. 146, 150, 19 C.M.R. 272, 276 (1955)). Put another way, an involuntary apprehension occurs when the accused's absence is terminated by "events and agencies wholly beyond . . . [the accused's] control." *Id.* at 196, 32 C.M.R. at 196 (alteration in original) (citations omitted).

The fact that an accused was apprehended does not, by itself, render the apprehension involuntary. A fact finder must examine the circumstances surrounding the apprehension to determine whether his return to military control was

involuntary. *See United States v. Salter*, 4 U.S.C.M.A. 338, 340, 15 C.M.R. 338, 340 (1954); *United States v. Beninate*, 4 U.S.C.M.A. 98, 99-100, 15 C.M.R. 98, 99-100 (1954). Relevant circumstances include an accused's statements and actions immediately before, during, and after apprehension, and "the nature, the purpose, and the result of the apprehension . . ." *See Salter*, 4 U.S.C.M.A. at 340, 15 C.M.R. at 340 (quoting *Beninate*, 4 U.S.C.M.A. at 100, 15 C.M.R. at 100).

In cases involving an apprehension by civilian authorities, involuntary apprehensions have been found in two situations. First, if an accused is "taken into custody as an absentee from the armed services" pursuant to a deserter's warrant that is discovered from someone other than the accused or someone acting at his request, his return to military will be deemed involuntary. *See United States v. Montoya*, 15 U.S.C.M.A. 210, 212, 35 C.M.R. 182, 184 (1965). Second, if an accused is arrested for a civilian criminal offense by civilian authorities, and he informs them of his status as a deserter solely "as a result of a desire to avoid trial, prosecution, punishment or other criminal action at the hands of such civilian authorities," his apprehension will also be deemed involuntary. *Fields*, 13 U.S.C.M.A. at 196-97, 32 C.M.R. at 196-97; *see also United States v. White*, 3 U.S.C.M.A. 666, 671, 14 C.M.R. 84, 89 (1954); *United States v. Babb*, 6 U.S.C.M.A. 191, 193, 19 C.M.R. 317, 319 (1955).

On the other hand, if an accused after apprehension by civilian authorities for a civilian offense—but before civilian authorities discover his status as a deserter—discloses his identity to civilian authorities because of his desire to return to military control, his return would be voluntary. *See generally Babb*, 6 U.S.C.M.A. 191, 19 C.M.R. 317.

In this case, the colloquy established a police officer who was "curious" about appellant's presence at a store ten minutes before closing time. When the officer asked for appellant's identification, appellant readily provided it and immediately volunteered his status as a deserter. Appellant was not apprehended when he advised the officer of his military absence. Thus, the record establishes that appellant initiated his return to military authorities by disclosing his identity and describing his status as a deserter.

Even if we found that the officer somehow initiated appellant's apprehension, the providence inquiry reveals no facts that appellant was facing any type of civilian criminal trial, prosecution, punishment, or other criminal action at the hands of civilian authorities. Thus, appellant had no civilian criminal action to avoid. Appellant confessed his absence to the officer because he "had a gut feeling" that the officer was going to run his identification and discover the warrant; that he "knew [he] had been caught and [he] was trying to make things better"; and "it was time to just kind of take care of this and get it over with." None of these reasons negate appellant's voluntary return to military control. Even appellant's

admission—that had the officer not asked for his identification, it is possible appellant still may be absent from his unit—is inapposite to the analysis. What matters in each case is whether and when appellant actually disclosed his absentee status and the reasons why he disclosed it. We find that the facts described by appellant during his providence inquiry reveal an intent by appellant to mitigate his situation and do not establish that his apprehension was involuntary.[*] Therefore, there is a substantial basis in law to question the providence of his plea to desertion terminated by apprehension. We are confident, however, that the military judge's inquiry is sufficient to establish appellant's guilt to desertion not terminated by apprehension.

CONCLUSION

We affirm only so much of the finding of guilty of the Specification of Charge I as provides:

> In that Private (E-1) Taylor J. Corbin, U.S. Army, did, on or about 26 October 2012, without authority and with intent to remain away therefrom permanently, absent himself from his unit, to wit: 4th Brigade Special Troops Battalion (R)(P), 4th Brigade Combat Team (R)(P), located at Fort Hood, Texas, and did remain so absent in desertion until on or about 4 March 2013.

The remaining findings of guilty are AFFIRMED.

Reassessing the sentence on the basis of the error noted, the entire record, and in accordance with the principles of *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986) and *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), we are confident the military judge would have adjudged the same sentence absent the error. The sentence is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision are ordered restored.

[*] In *United States v. Nickaboine*, our superior court recognized the possibility of an accused volunteering to civilian authorities that he is absent without leave or in desertion to seek mitigation of his case, recognizing an admission with such intent a voluntary termination by the accused. 3 U.S.C.M.A. at 155; 11 C.M.R. at 155.

Judge CAMPANELLA and Judge KRAUSS concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court